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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS SELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government established by clear and convincing evidence that petitioner may be treated, over his objection, with antipsychotic medication to restore his competence to stand trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 282 F.3d 560. The order of the district court (Pet. App. A29-A46) is unreported. The memorandum and order of the magistrate judge (Pet. App. A13-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2002. A petition for rehearing was denied on May 7, 2002. Pet. App. A47. The petition for a writ of certiorari was filed on August 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 16, 1997, petitioner, a dentist, was charged in a complaint with making false representations in connection with payments for health care services, in violation of 18 U.S.C. 1035(a)(2). The complaint alleged that petitioner and his wife submitted false claims, including false documents and bogus x-rays, to Medicaid and private insurance companies for dental services not provided. On May 20, 1997, the government filed a motion for a psychiatric examination of petitioner to determine his competence to stand trial, and a magistrate judge ordered that petitioner be sent to the U.S. Medical Center for Federal Prisoners at Springfield, Missouri ("Springfield"), for an evaluation. On July 15, 1997, after receiving a psychiatric evaluation from Springfield, the district court held that petitioner was competent to stand trial. Pet. App. A2-A3; Gov't C.A. Br. 3-6.

On July 30, 1997, an indictment was returned charging petitioner and his wife with 56 counts of mail fraud, in violation of 18 U.S.C. 1341; six counts of Medicaid fraud, in violation of 42 U.S.C. 1320a-7b(a)(1); and one count of money laundering, in violation of 18 U.S.C. 1957(a). Petitioner was released on bond in August 1997. Pet. App. A3; Gov't C.A. Br. 6-7.

On January 22, 1998, the government petitioned to revoke petitioner's bond, alleging that he had attempted to intimidate a witness. During an initial appearance before a magistrate judge,

petitioner screamed, shouted, and used racial epithets. When the magistrate judge tried to proceed, petitioner leaned towards her and spit directly in her face. Following a bond revocation hearing on January 26, 1998, petitioner's bond was revoked and he was detained. Pet. App. A3; Gov't C.A. Br. 7-9.

On April 23, 1998, petitioner was charged in a second indictment with conspiring to murder a witness and an FBI agent, in violation of 18 U.S.C. 1114; two counts of attempted murder of a federal witness, in violation of 18 U.S.C. 1512(a) and 1513(a); one count of attempted murder of a federal officer, in violation of 18 U.S.C. 1114; and two counts of soliciting violence, in violation of 18 U.S.C. 373. The second indictment alleged that petitioner and his wife solicited a hit man to kill a former employee at his dental office and the FBI agent who arrested him. Following a detention hearing on April 28, 1998, petitioner was detained. Over the next several months, the trial date on the two indictments was continued on a number of occasions at the request of both parties. Pet. App. A3; Gov't C.A. Br. 9-11.

2. On February 9, 1999, petitioner's counsel moved for a hearing to determine petitioner's competency to stand trial, and the government moved to have a government psychologist examine petitioner. Both petitioner's psychologist and the government psychologist diagnosed petitioner with delusional disorder, persecutory type. After a hearing on April 14, 1999, the district

court found that petitioner was suffering from a mental disease or defect that rendered him incompetent to stand trial. The court ordered that petitioner be hospitalized at Springfield for a reasonable period of time not to exceed four months to determine whether there was a substantial probability that he would attain the capacity to stand trial. Pet. App. A3; Gov't C.A. Br. 11-12.

At Springfield, petitioner was under the care of two clinicians, Dr. Richard DeMier, the clinical psychiatrist, and Dr. James Wolfson, the consulting psychiatrist, who determined that petitioner was in need of antipsychotic medication. At an administrative hearing on June 9, 1999, before a medical hearing officer, Dr. DeMier and Dr. Wolfson testified that using antipsychotic medication to treat petitioner was the only way he could be restored to competency. Petitioner proffered the affidavit of his psychiatrist, Dr. Robert Cloninger, who opined that petitioner would not respond to medication. Petitioner also called a number of witnesses and testified that he did not want to take antipsychotic medication and have his chemistry altered. Pet. App. A3-A4; Gov't C.A. Br. 12-13.

The medical hearing officer concluded that antipsychotic medication was the treatment of choice. He found that petitioner's delusional thinking could make him dangerous and that no other forms of medication or treatment could treat his delusional symptoms. Petitioner's administrative appeal was denied, but

Springfield delayed administration of the medication to give petitioner the opportunity to seek judicial review. Pet. App. A4; Gov't C.A. Br. 13.

3. At a hearing before a magistrate judge on September 29, 1999, Dr. DeMier and Dr. Wolfson testified that petitioner was in need of antipsychotic medication, that his condition would continue to deteriorate without it, that his behavior could be dangerous, and that antipsychotic medication was likely to restore him to competency. Petitioner submitted an affidavit from Dr. Cloninger, who stated that antipsychotic medication would not benefit petitioner. Dr. Cloninger recommended basic support, voluntary symptomatic treatment, and access to reading material and exercise. Pet. App. A4; Gov't C.A. Br. 14.

On August 9, 2000, the magistrate judge ordered that petitioner be involuntarily administered antipsychotic medication. Pet. App. A13-A28. He found that petitioner posed "a danger to himself and others at the institution," id. at A24, that antipsychotic medications were "the only way to render petitioner not dangerous and competent to stand trial," id. at A26, and that there were "no other less restrictive means by which this may be accomplished." Ibid.

4. The district court affirmed the magistrate judge's order. Pet. App. A29-A46. The court concluded that the magistrate judge's finding that "[petitioner] present[ed] a danger to himself or

others sufficient to constitute a compelling state interest outweighing his interest in refusing anti-psychotic medication" was "clearly erroneous." Id. at A39. The court, however, also found: "(1) that anti-psychotic drugs are medically appropriate for [petitioner], (2) that they represent the only viable hope of rendering [petitioner] competent to stand trial, and (3) that the administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of [petitioner's] guilt or innocence of numerous and serious charges." Id. at A45. Based on those findings, the court concluded that "[petitioner's] substantive due process rights do not preclude the involuntary administration of anti-psychotic medication." Ibid.

5. A divided panel of the court of appeals affirmed. Pet. App. A1-A12. The court upheld the district court's ruling that the evidence did not support a finding that petitioner posed a danger to himself and others at the medical center. Id. at A5. Relying on Washington v. Harper, 494 U.S. 210 (1990), and Riggins v. Nevada, 504 U.S. 127 (1992), the court then concluded that, "subject to the limitations outlined below, the government may forcibly administer antipsychotic medication for the sole purpose of rendering a pre-trial detainee competent to stand trial without violating the accused's due process rights." Pet. App. A6.

The court of appeals rejected petitioner's claim that the district court employed the wrong standard of review to determine

whether forced administration of medication was appropriate in his case. Pet. App. A6. The court noted that this Court in Riggins declined to adopt a strict scrutiny standard, the standard urged by petitioner. Ibid. The court of appeals held:

> [T]he government must meet the following test in order for the government to forcibly medicate an individual. First, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication. * * * Second, the government must prove that there is no less intrusive way of fulfilling its essential interest. * * * Third, the government must prove by clear and convincing evidence that the medication is medically appropriate. * * *

Ibid. (citations omitted). The court further explained that "[m]edication is medically appropriate if: (1) it is likely to render the patient competent * * *; (2) the likelihood and gravity of side effects do not overwhelm its benefits * * *; and (3) it is in the best medical interests of the patient." Ibid. (citations omitted).

Applying that standard, the court of appeals first concluded that "[t]he government has an essential state interest in bringing a defendant to trial." Pet. App. A7. The court noted that "[n]ot all charges, however, are sufficient to justify forcible medication of a defendant; rather, the charges must be serious." Ibid. The court decided that the 62 charges of fraud and single count of money laundering were serious enough to outweigh petitioner's

significant liberty interest in refusing antipsychotic medication. Ibid.[4]

Second, the court of appeals upheld the district court's finding that there were no less intrusive means by which the government could achieve its essential interest in bringing petitioner to trial. Pet. App. A7. The court observed that "[b]oth Dr. Wolfson and Dr. DeMier testified that antipsychotic medication [was] the most effective treatment for delusional disorder and that it [was] the only way [petitioner] could be restored to competency." Ibid. The court also noted that the affidavit from petitioner's psychologist, Dr. Cloninger, who disputed the efficacy of the medication, "did not suggest any alternative means of restoring competency." Ibid.

Third, the court of appeals upheld the district court's finding that antipsychotic medication was medically appropriate for petitioner's treatment. Pet. App. A7-A9. The court reviewed the testimony of Drs. Wolfson and DeMier and the affidavit of Dr. Cloninger, as well as a report by another psychologist submitted by petitioner. Id. at A7-A8. The court "acknowledge[d] that there [was] a difference of opinion on the efficacy of using

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[4] The court declined to consider whether the conspiracy to murder an FBI agent and a witness and the related offenses charged in the second indictment were sufficient to involuntarily medicate petitioner because "it [was] possible that [petitioner's] threats after his first indictment were a manifestation of his delusional disorder." Pet. App. A7 n.8.

antipsychotic drugs to treat delusional disorder," but the court did not believe that "the district court committed clear error in finding that the government proved medical appropriateness by clear and convincing evidence." Id. at A9. The court observed that the district court had found "a sufficient likelihood that antipsychotic medication [would] restore [petitioner's] competence," ibid., "that the side effects produced by the medication could be minimized through careful treatment and changing medications and dosages," ibid., and that the "benefits outweighed the risks associated with antipsychotic drugs." Ibid. The court of appeals accordingly concluded that "[t]he district court did not err in applying the wrong standard of review" and that "the government proved [the three required] elements by clear and convincing evidence." Ibid.

The court of appeals also found that, "before forcibly medicating an accused, there must be evidence that he will be able to participate in a fair trial." Pet. App. A9. The court found that "the medical evidence presented indicated a reasonable probability that [petitioner] will fairly be able to participate in his trial." Id. at A10. The court also noted that the district court had indicated "its willingness to re-examine [petitioner's] Sixth Amendment claim after the medication regime has begun." Ibid. The court concluded that "[t]he evidence offered, that the drugs should not interfere with [petitioner's] right to a fair

trial, as well as post-medication procedures that ensure he will not be treated unfairly, are sufficient to protect [petitioner]." Ibid.

Judge Bye dissented. Pet. App. A10-A12. He would have "appl[ied] the strict scrutiny standard of review for the reasons enunciated by the Sixth Circuit in United States v. Brandon, 158 F.3d 947, 956-961 (6th Cir. 1998)." Pet. App. A10. He also argued that the government had failed to satisfy the first part of the majority's three-part test because "the [fraud and money laundering] charges against [petitioner] are not sufficiently serious to forcibly inject him with antipsychotic drugs on the chance it will make him competent to stand trial." Ibid.

ARGUMENT

Petitioner challenges (Pet. 1-12) the determination of the courts below that petitioner may be involuntarily medicated so that he may stand trial. The lower courts' conclusion that the government had satisfied the demanding inquiry discussed in Riggins v. Nevada, 504 U.S. 127 (1992), and Washington v. Harper, 494 U.S. 210 (1990), under a clear-and-convincing burden of proof, is amply supported by the record and does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. Although this Court has held that a person detained for trial has a constitutionally protected interest in not being

subjected to involuntary treatment with antipsychotic drugs, it has recognized that that interest may be outweighed by the State's interest in medicating an individual in appropriate circumstances. See Riggins, 504 U.S. at 135; Harper, 494 U.S. at 225-226.

In Harper, this Court held a State may treat a mentally ill prisoner with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and if the treatment is in the inmate's medical interest. 494 U.S. at 227. The Court upheld a state correctional institution's policy allowing involuntary treatment of mentally ill and dangerous prisoners with antipsychotic drugs when the State "establish[ed], by a medical finding, that a mental disorder exist[ed] which [was] likely to cause harm if not treated." Id. at 222. The policy required that medication be prescribed by one psychiatrist and approved by another, "ensur[ing] that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of the institutional confinement." Ibid. The Court determined that those standards, which "recognize both the prisoner's medical interests and the State's interests, meet the demands of the Due Process Clause." Id. at 222-223.

In Riggins, the Court held that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness." 504 U.S. at 135. The Court reversed the conviction in

that case because the state trial court had ordered that the defendant (Riggins) be administered antipsychotic drugs during his trial "without making any determination of the need for this course or any findings about reasonable alternatives." Id. at 136. The Court emphasized, however, that the State could have established an adequate justification for involuntary medication by proving that such treatment was medically appropriate and essential for the safety of Riggins or others. Id. at 135. The Court also noted that the State might have justified medically appropriate, involuntary treatment with antipsychotic drugs "by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." Id. at 135.

The court of appeals' decision in this case comports with Harper and Riggins. The court recognized that petitioner has a significant liberty interest in avoiding forced medication. Pet. App. A5. But the court held that the government in this case had adequately justified its decision to medicate petitioner. The court noted that "[t]he government has an essential interest in bringing a defendant to trial" and concluded that, "[d]espite [petitioner's] significant liberty interest in refusing anti-psychotic medication, in view of the seriousness of the charges, * * * the government's interest in restoring his competency so that he may be brought to trial is paramount." Ibid. The court further found that there was no less intrusive means by which the

government could achieve its essential interest in bring petitioner to trial, id. at A7, and that antipsychotic medication was medically appropriate for petitioner's treatment, id. at A7-A9. Those findings do not warrant further review.

Petitioner argues that (Pet. 2-11) that the court of appeals erred in failing to determine whether he had a "fundamental" right to bodily integrity and in failing to apply strict scrutiny. This Court, however, has never held that the right of an inmate to be free from unwanted medication is "fundamental." As the court of appeals noted (Pet. App. A6), this Court made clear in Riggins that it was not "adopt[ing] a standard of strict scrutiny" to review a hospital's decision to administer forced medication to a pretrial detainee. 504 U.S. at 136; see also United States v. Gomes, 289 F.3d 71, 82 (2d Cir. 2002) (declining to adopt strict scrutiny standard as "unduly restrictive").

In any event, there is no reason to believe that a strict-scrutiny standard would produce any different outcome on the record in this case. The Court found that "[t]he government has an essential interest in bringing a defendant to trial." Pet. App. A7 (citing Illinois v. Allen, 397 U.S. 337, 347 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and a prerequisite to social justice and peace.")). There is little question that if it had been required to find a "compelling" government interest, the

court would have done so. Moreover, the court determined that the government had established by clear and convincing evidence that antipsychotic medication would likely restore petitioner to competence to stand trial and that involuntary medication was the only way for the government to achieve that goal. Id. at A7-A9. The evidence amply supports those findings, and they are co-extensive with the tailoring requirement of strict scrutiny. Cf. United States v. Weston, 255 F.3d 873, 882-883 (D.C. Cir.), cert. denied, 122 S. Ct. 670 (2001).

Petitioner argues (Pet. 9-11) that the government's interest in bringing him to trial on charges that he committed non-violent crimes involving economic losses is not sufficiently "essential" or "compelling" to overcome his liberty interest in avoiding forced medication. In this case, however, petitioner was charged with 56 counts of health care fraud, six counts of Medicaid fraud, and one count of money laundering. The indictment alleged a pervasive scheme, orchestrated by petitioner and his wife, to submit hundreds of false claims to Medicaid and private insurance companies between 1989 and 1997. The indictment alleges that petitioner, and employees at his direction, submitted manufactured x-ray images and other altered dental records to Medicaid and private insurance companies to reflect dental problems that did not exist and dental services that were not performed. Those crimes harmed not only petitioner's patients but society at large. The court of appeals

correctly concluded that those charges were sufficiently serious to outweigh petitioner's liberty interest in avoiding forced medication. Pet. App. A7. Accord Gomes, 289 F.3d at 82 ("[W]e cannot accept the proposition that involuntary medication should be limited to defendants who are prosecuted for only the most heinous crimes."); id. at 85 (government's interest in bringing a defendant to trial is "case specific," including consideration of "whether the crime is one that is broadly harmful").[2/]

2. Petitioner claims (Pet. 12-15) that the federal circuits and state courts are in conflict over the standard governing the determination whether the government may medicate a defendant over his objection for the purpose of restoring his competency to stand trial. Pet. 24. That claim provides no basis for granting review in this case.

The court of appeals' three-part standard in this case is consistent with the "heightened scrutiny" standard applied by the District of Columbia and Second Circuits. United States v. Gomes, 289 F.3d 71, 82 (2d Cir. 2002); United States v. Weston, 255 F.3d

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[2/] Petitioner suggests (Pet. 9 n.4) that civil commitment would provide an "alternative remedy" in this case. But "even though civil commitment might reduce the danger to the community posed by an individual, it cannot address a host of other important societal concerns and values served by a criminal trial: 'the retributive, deterrent, communicative and investigative functions of the criminal justice system * * * serve to ensure that offenders receive their just deserts, to make clear that offenses entail consequences, and to discover what happened through the public mechanism of trial.'" Gomes, 289 F.3d at 81 (quoting Weston, 255 F.3d at 882).

873, 880 (D.C. Cir.), cert. denied, 122 S. Ct. 670 (2001). Petitioner claims (Pet. 7, 13), though, that the decision in this case conflicts with the strict scrutiny standard adopted by the Sixth Circuit in United States v. Brandon, 158 F.3d 947, 960 (6th Cir. 1998). Although the Sixth Circuit in Brandon and the Eighth Circuit in this case characterized the governing analysis differently, the two decisions are not in direct conflict because the three-part standard applied by the Eighth Circuit is functionally equivalent to the inquiry conducted by the Sixth Circuit in Brandon.

Under its "strict scrutiny" approach, the Brandon court required the government to prove a "compelling" state interest, Brandon, 158 F.3d at 961, while under its three-part standard the Eighth Circuit required the government to show an "essential" interest, Pet. App. A6. Both courts considered whether the antipsychotic medication was "medically appropriate" and whether "less intrusive alternatives" to antipsychotic medication existed. Brandon, 158 F.3d at 960; Pet. App. A6, A9. Both courts assessed the impact that antipsychotic medication could have on the defendant's fair trial rights. Brandon, 158 F.3d at 960; Pet. App. A9-A10. And both courts recognized that the defendant's interest in avoiding unwanted medication was significant, but not absolute. Brandon, 158 F.3d at 953-954; Pet. App. A5.

The other federal court of appeals decision on which petitioner relies (Pet. 13) in attempting to establish a conflict, Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985), does not further his claim. Bee was decided before this Court's decisions in Harper and Riggins. In addition, the Bee court stated that the involuntary administration of antipsychotic medication to a pretrial detainee could not be justified on the ground that such treatment was necessary to maintain the detainee's competence, since the detainee in that case had already been found competent to stand trial. Bee, 744 F.2d at 1395. By contrast, the courts below found that petitioner is incompetent to stand trial, and that that is unlikely to change in the absence of the challenged medication.[3/]

Nor do the state court decisions cited by petitioner support his claim of a direct conflict with the decision below. Four of the cases -- People v. Hardesty, 362 N.W.2d 787 (Mich. Ct. App. 1984); State v. Lover, 707 P.2d 1351 (Wash. Ct. App. 1985); State v. Hayes, 389 A.2d 1379 (N.H. 1978), and State v. Law, 244 S.E.2d

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[3/] Petitioner's reliance on district court cases to establish a conflict is equally unavailing. Those cases applied either a strict scrutiny standard (United States v. Santonio, 2001 WL 670932 (D. Utah May 3, 2001), and Woodland v. Angus, 820 F.Supp. 1497 (D. Utah 1993)), or a standard derived from Riggins and similar to that applied below (see United States v. Sanchez-Hurtado, 90 F.Supp.2d 1049 (S.C. Cal. 1999)). For the reasons discussed above (at 16), those approaches are not in direct conflict.

302 (S. Car. 1978) -- were decided long before Harper and Riggins.[1] State v. Odiaga, 871 P.2d 801 (Idaho), cert. denied, 513 U.S. 952 (1994), was remanded so that the trial court could reconsider its opinion in light of Riggins. In the other cases cited by petitioner -- State v. Garcia, 658 A.2d 947 (Conn. 1995), and Khiem v. United States, 612 A.2d 160 (App. D.C. 1992), cert. denied, 507 U.S. 924 (1993) -- the courts recognized, as did the court below, that the State may involuntarily medicate a defendant if the administration of the drugs is "medically appropriate," and the state demonstrates an overriding justification for doing so. Garcia, 658 A.2d at 964; Khiem, 612 A.2d at 165-166.

Furthermore, even if the asserted conflict were real, this case would be an ill-suited vehicle for resolving it. The extensive record developed in this case satisfies the strict scrutiny standard espoused by petitioner. See pp. 13-14, supra. On the record before this Court, the government has demonstrated that treating petitioner with antipsychotic drugs will not deprive him of his due process rights, regardless of the applicable standard of scrutiny.

3. Petitioner also asserts (Pet. 15-16) a conflict among the circuits and the state courts of highest resort on the standard of proof that the government must meet to justify administering forced

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[1] In addition, Hardesty and Lover were decisions by intermediate appellate courts, not state courts of last resort.

medication. That contention provides no basis for review. Petitioner asserts (Pet. 16) that the government should be required to satisfy the clear-and-convincing evidence standard. The court of appeals concluded, however, that the government proved the elements of the three-part test "by clear and convincing evidence" in this case. Pet. App. A9.

In any event, where, as here, courts have required a judicial hearing to determine whether medication should be administered to an inmate solely to restore competence, they have ruled that the government must meet its burden by "clear and convincing" evidence. See Brandon, 158 F.3d at 961; Sanchez-Hurtado, 90 F.Supp.2d at 1055; Garcia, 658 A.2d at 967. The government has not challenged the application of that standard in this case. And petitioner identifies no cases in which a court has applied a lesser standard at a judicial hearing. One case cited by petitioner (Pet. 16) dealt with the separate question of whether due process is met when medical professionals initially decide whether antipsychotic medication is medically necessary, and whether the courts should apply a deferential standard of review to that decision. See Khiem, 612 A.2d at 171-172. Because that question is not implicated by the facts of this case, and because the court below applied the standard that petitioner advocates, further review is unnecessary.

4. Finally, petitioner asserts (Pet. 17-19) a conflict among the circuits on whether courts must determine whether administering antipsychotic medication would adversely affect a defendant's trial rights. Petitioner's claim rests on the premise that the courts below did not conduct a pre-medication analysis of whether petitioner's trial rights would be prejudiced. The record belies that claim. In addressing petitioner's Sixth Amendment claim, the court of appeals recognized that "before forcibly medicating an accused, there must be evidence that he will be able to participate in a fair trial," Pet. App. A9, and the court concluded that "[t]hat burden was met in this case." Id. at A10. That analysis is the same type of pre-medication analysis of a defendant's trial rights as has been conducted by the other courts of appeals. Gomes, 289 F.3d at 82-84; Weston, 255 F.3d at 883-885; Brandon, 158 F.3d at 960. Indeed, in concluding that forced medication would not prejudice petitioner's right to a fair trial, the court below specifically cited Brandon. Pet. App. A9-A10. Accordingly, petitioner's claim warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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